No. 78-1440

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM ROSE and ROBERT PETERSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

FRANK W. OLIVER
343 S. Dearborn Street
Chicago, Illinois 60604
Attorney for WILLIAM ROSE

JULIUS LUCIUS ECHELES
35 E. Wacker Drive
Chicago, Illinois 60601
Attorney for ROBERT PETERSON

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO.

UNITED STATES OF AMERICA,

Petitioners,

vs.

WILLIAM ROSE and ROBERT PETERSON,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, William Rose and Robert Peterson, pray that a Writ of Certiorari issue to review the Opinion and judgment rendered on December 20, 1978 by the United States Court of Appeals for the Seventh Circuit. (App. A)

Opinion Below

The Opinion of the Court of Appeals for the Seventh Circuit decided on December 20, 1978, is not yet reported, but is reprinted in the Appendix hereto as App. A.

Jurisdiction

Following a jury trial,[1] petitioners were convicted of conspiracy to transport stolen property in interstate commerce over the value of $5,000, in violation of Title 18, Sec. 371, U.S. Code, and each was sentenced to a one year term in custody.

After affirmance by the United States Court of Appeals for the Seventh Circuit on December 20, 1978, that court denied a timely-filed Petition for Rehearing on February 23, 1979. (App. B)

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this court.

Issues Presented

1.

(A) Whether defendants can be shown to be guilty of conspiracy where a government agent instituted the plan of conspiracy, merely feigned an agreement, and where the government could not prove any overt act which did not include a government agent's participation?

(B) Where there is admittedly no evidence that any property was stolen prior to or after the so-called conspiratorial agreement and therefore, defendants could not have "knowledge" that any property was stolen—as alleged in the indictment—may a conviction for conspiracy to transport stolen goods in interstate commerce, knowing the same to have been stolen, be sustained?

[1] In the District Court for the Northern District of Illinois, Eastern Division.

2.

Where the government "loses" a tape recording allegedly made between one of the defendants and an undercover informant, is it not error to permit the government to introduce evidence about the alleged context of the tape—absent a showing of non-negligence, and without appropriately-offered instructions?

Statutory Provisions Involved

Title 18 U.S. Code, Sec. 371, in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

Title 18 U.S. Code, Sec. 2314, in relevant part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000.00 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined no more than $10,000.00 or imprisoned not more than ten years, or both.

Statement Of The Case

The government charged defendants (petitioners) William Rose ("Rose") and Robert Peterson ("Peterson") with conspiracy in violation of 18 U.S.C. Sec. 371 to transport stolen property in interstate commerce "knowing the same to have been stolen," in violation of 18 U.S.C. Sec. 2314.

Seven witnesses appeared at trial for the government, six of whom were government agents. Neither Peterson or Rose introduced evidence, but both moved for judgments of acquittal. The motions were denied by the court and the jury found defendants guilty.

Statement Of Facts

The essential facts appear in the court's Opinion (App. 2-6) and need not be repeated here. A synopsis, however, is in order:

One, James Srbinovich, was employed by federal agents to contact defendant Rose, whom Srbinovich had known previously. Srbinovich stated he was in Albuquerque and Rose told him he wanted Srbinovich to burglarize an apartment in Phoenix, Arizona. Later discussions, some of which were tape recorded (but "lost" by the government), developed into a meeting between Srbinovich and Robert Peterson, who lived in Phoenix, Arizona, and who showed Srbinovich and the DEA Agent Scaggs the house in Scottsdale, Arizona to be burglarized. Scaggs and other FBI Agents notified the prospective victim, who permitted them to take pictures of certain jewelry and art that were in the house. Srbinovich told Peterson and Rose that he had successfully committed the burglary and showed Rose, in Chicago, pictures of the supposedly stolen property. Scaggs and Srbinovich testified they were able to get Rose to agree to pay $10,000 for the supposedly stolen property.

Reasons For Granting The Writ

1.

(A) Whether defendants can be shown to be guilty of conspiracy where a government agent instituted the plan of conspiracy, merely feigned an agreement, and where the government could not prove any overt act which did not include a government's agent participation?

(B) Where there is admittedly no evidence that any property was stolen prior to or after the so-called conspiratorial agreement and therefore, defendants could not have "knowledge" that any property was stolen—as alleged in the indictment—may a conviction for conspiracy to transport stolen goods in interstate commerce, knowing the same to have been stolen, be sustained?

The Court of Appeals succinctly posed the question in the case as follows:

> "The principal issue before us is whether the defendants can be found guilty of a conspiracy under 18 U.S.C. Section 371 to transport in interstate commerce goods valued at $5,000 or more, knowing the goods to be stolen in violation of 18 U.S.C. Sec. 2314 when no goods were ever stolen because the defendants unwittingly engaged agents of the government to perform the actual theft and transportation." (App. 1)

Although the Court of Appeals, of course, held in the affirmative, its holding in this matter violates constitutional law when the court ruled that even though no overt acts *could be proven,* the conspiracy was nonetheless shown. (App. 7, 8)

Thus, the Court of Appeals has sanctioned a conviction based on evidence of acts entirely stimulated by the government—but different from entrapment, because the criminal deed, the "conspiratorial agreement" was legally impossible of accomplishment.

Although both the government at trial and on appeal and the Court of Appeals in its Opinion admit that any agreements between Srbinovich and Rose and Peterson cannot exist in law, the Appellate Court nonetheless held a conspiracy was shown, notwithstanding that not one single overt act was proven as alleged. We point out that this bizarre and unusual case is one in which the government "participated" as fellow conspirators against its own laws, and was farther permitted to participate to the extent of being an essential party to an overt act, absent which no punishable agreement was entered into, and hence no crime was committed against the government.

We point out also that defendants are convicted of an indictment wherein they are charged to have agreed to transport goods in interstate commerce *"knowing the same to have been stolen."* Not only did the proof demonstrate that nothing was stolen, but that the agents never intended to steal anything—and did not. By what thought process and tortuous reasoning can it be established that defendants can conspire to transport goods "knowing the same to have been stolen" we cannot divine—and the Appellate Court's Opinion does not assist. Although the Appeals Court felt that the argument was "plausible . . . at first" (App. 7), it opined, notwithstanding the allegation that defendants knew that the goods were stolen, that it was merely *irrelevant* that they were so charged. (App. 8)

The court has ignored this court's holding in *United States* v. *Falcone,* 311 U.S. 205 (1940) that the gist of the conspiracy is the agreement amongst the conspirators. See also *Krulewitch* v. *United States,* 366 U.S. 440 at 448 (1948); *Ingram* v. *United States,* 360 U.S. 672 (1959). Further the holding of the Seventh Circuit Court of Appeals seems to be in conflict with the Second Circuit in *United States* v. *Rosenblatt,* 554 F.2d 36 (1977).

This court should grant certiorari to review the circumstances and the law in connection with this most unusual case.

2.

Where the government "loses" a tape recording allegedly made between one of the defendants and an undercover informant, is it not error to permit the government to introduce evidence about the alleged context of the tape—absent a showing of non-negligence?

Government undercover employee Srbinovich testified he talked on the telephone with Rose on October 7, 1975 and that the phone call was taped. He testified he heard the tape played back six months before the trial (January 18, 1978) (Tr. 147); and he testified he also heard it *a few days before the commencement of the trial.* (Tr. 149-50) But other government witnesses testified that the tape recording that had been made was lost about October 8, 1975 when it was sent to the typing pool. (Tr. 220-221; 337-39) No adequate explanation was given by any government witness as to the whereabouts of the tape. (Tr. 338-40; 389-93) Over objections that oral testimony concerning this supposed tape recorded conversation should be excluded, Srbinovich and other government witnesses testified to their respective recollection of this important supposed conversation with Rose. (Tr. 23; 219-20).

As the best evidence of that conversation was clearly the tape recording, and as the government made no explanation for the absence of the tape—in the face of Srbinovich's unequivocal testimony that he heard the tape several days before the trial, (Tr. 149-50)—the evidence *about* the context of the tape should have been excluded. *Gay* v. *United States,* 118 F.2d 160 (7 Cir. 1941); *Sylvania Electric Products, Inc.* v. *Flanningan,* 352 F.2d 1005 (1 Cir. 1965); *Fed.R.Evid.* 1001 and 1002.

At best, the evidence showed reckless conduct on the part of the government resulting in loss of a critical tape recording. *E.g., Fed.R.Evid.* 1004(1). At worst, an inference of intentional destruction or withholding of a tape recording containing matter adverse to the government can be drawn. See, *e.g., A.C. Becker Co.* v. *Gemex Corp.,* 314 F.2d 839 (7 Cir. 1963). In either case, the government should not have been permitted to adduce secondary oral testimony concerning this conversation, placing an impermissible burden upon Rose and Peterson to testify to prove their innocence.

Even if oral testimony of government witnesses was properly permitted the failure of the trial court to issue a tendered instruction concerning spoliation was reversible error. (App. 10) The refused instruction essentially stated that where a party, such as the government, has evidence in its possession which it claims would tend to establish the proof of its case, its failure to produce the evidence for non-innocent reasons raises a presumption that if produced, the evidence would not have the claimed effect. (App. 11)

The Court of Appeals held simply that the tape recording did not constitute "best evidence" (App. 9) but it set out no cogent reason why the best evidence rule should not be applicable.

And with respect to the proposed instruction offered by defendants (App. 11), the Appeals Court held that such was "argumentative"; but there was no other instruction given by the court or offered by the government. Should not defendants have some protection where either spoliation was shown or, if Srbinovich's testimony is to be credited that he heard the tape a few days before the trial (Tr. 149-50), then the evidence about the tape should not have been received at all.

Conclusion

Because the circumstances of the case are bizarre, because the law as announced by the Court of Appeals for the Seventh Circuit is unique and violative of defendants' constitutional rights, we respectfully pray that certiorari should be allowed.

Respectfully submitted,

FRANK W. OLIVER
JULIUS LUCIUS ECHELES
Attorneys for Petitioners
ROSE *and* PETERSON, *respectively.*

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1331

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM ROSE and ROBERT PETERSON,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 CR 929—Alfred Y. Kirkland, *Judge.*

Argued October 31, 1978—Decided December 20, 1978

Before PELL and TONE, *Circuit Judges,* and WHELAN, *Senior District Judge.**

* The Honorable Francis C. Whelan, Senior District Judge of the United States District Court for the Central District of California is sitting by designation.

TONE, *Circuit Judge*. The principal issue before us is whether the defendants can be found guilty of a conspiracy under 18 U.S.C. § 371 [1] to transport in interstate commerce goods valued at $5,000 or more, knowing the goods to be stolen, in violation of 18 U.S.C. § 2314,[2] when no goods were ever stolen because the defendants unwittingly engaged agents of the government to perform the actual theft and transportation. We answer the question in the affirmative and affirm the convictions.

One James Srbinovich, while in the McHenry County Jail in Woodstock, Illinois, met with two Special Agents of the Drug Enforcement Administration. In the presence of the agents, Srbinovich placed a telephone call to defendant William Rose, whom Srbinovich had known for 15 or 20 years. In the conversation Srbinovich stated that he was in Albuquerque. Rose said, "I want to talk to you right away. I have got something for you." Asked, "What is that?," Rose said, "Well, you went on it once before." (Srbinovich had met with both defendants a year earlier at Rose's apartment to discuss the commission of a burglary in Arizona.) Srbinovich said he was broke. Rose replied that he would wire him $500 "because this thing has to go over the weekend." Rose later wired $500 to Albuquerque addressed to Srbinovich, which government agents collected.

[1] 18 U.S.C. § 371 reads in relevant part,

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2] 18 U.S.C. § 2314 reads in relevant part,

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . Shall be fined no more than $10,000 or imprisoned not more than ten years, or both.

The telephone conversation was proved at trial by the testimony of Srbinovich and one of the DEA agents who was with Srbinovich. Although the agents monitored and recorded the conversation on tape with Srbinovich's permission, the recording was not presented at trial because the government represented to the court that it had lost the tape.

Three days after the telephone conversation, Srbinovich met with Rose in Chicago, at which time they discussed a burglary to be committed in Scottsdale, Arizona. Rose stated that Srbinovich, and a partner Srbinovich was to find, would receive two-thirds of the take. Rose and the "tipster" in Arizona would split the remaining third between themselves. Rose described the valuables to be taken, which he estimated were worth approximately $200,000.

A few days later Srbinovich went to Rose's apartment in Chicago with DEA Agent Skaggs, who posed as Srbinovich's partner, to receive instructions. Rose told them to go to Scottsdale and meet with "Bob," who would give them the layout of the house and further instructions. Rose also instructed them to return to Chicago with the stolen goods because Bob was the real estate agent who had sold the house to the intended victim, and thus would be an obvious suspect. Rose informed them that he knew of a person who would come to Chicago to purchase the goods. Finally, Rose told them to get everything, because he had been planning this for a long time.

Two days later Srbinovich and Skaggs went to Scottsdale and checked into a motel. The next day Srbinovich called Rose to give him their phone number and location. Rose told them he would relay the information to Bob, who would contact them. When Rose could not reach Bob, he called Srbinovich and gave him Bob's number. Srbinovich finally reached Bob at that number, and they made plans to meet at the motel that evening.

Srbinovich and Skaggs met that evening with Bob, who turned out to be defendant Robert Peterson. In the ensuing conversation Peterson described the house and surrounding area, the burglar alarm system, and the valuables they planned to steal. He estimated the combined value of only two of the many pieces, a necklace and a ring, at $100,000.

During the next two days, Peterson met with Srbinovich and Skaggs several more times to discuss details of the plan, and drove them out to the house to look it over. At one point, Peterson stated that Srbinovich and Skaggs had to take the goods out of the state.

On the day Srbinovich and Skaggs were to commit the burglary, FBI agents took photographs of various pieces of jewelry and art in the house. Later that day, Srbinovich called Peterson and Rose to tell them that he had successfully committed the burglary. The next day Srbinovich and Skaggs returned to Chicago with the FBI photographs, which they showed to Rose. They arranged to meet later to divide up the goods, but when they did meet they could not agree as to the amount of payment. Two days later Skaggs contacted Rose and agreed to his price, $10,000. They met that afternoon, and, when Rose stated that he had the money and was ready to proceed with the transaction, he was arrested. Peterson was subsequently arrested in Arizona.

The events we have described were proved primarily by the testimony of Srbinovich and Skaggs. Neither defendant testified in the trial before a jury, in which both were found guilty of the offense of conspiracy to violate 18 U.S.C. § 2314.

I.

Concededly, Srbinovich and Skaggs never intended to steal valuables and transport them in interstate commerce, and there were no stolen goods. On these facts defendants base several arguments for acquittal.

A.

First, it is argued that Srbinovich and Skaggs, who merely feigned participation, were necessary parties to the conspiracy. It takes only two to conspire, however, and the evidence showed a conspiracy between the two defendants to burglarize the house in Arizona and transport the goods in interstate commerce. That their plan was doomed because they unwittingly chose as their instrumentalities agents of the government is irrelevant to the existence of the conspiracy.

Neither *United States* v. *Chase,* 372 F.2d 453 (4th Cir. 1967), nor *Sears* v. *United States,* 343 F.2d 139 (5th Cir. 1965), relied on by defendants, is to the contrary. *Chase* merely held that no conspiracy could exist between a single defendant and a government agent, and *Sears* did not reach the issue. *United States* v. *O'Brien,* 51 F.2d 674 (7th Cir. 1931), and *United States* v. *Wray,* 8 F.2d 429 (N.D. Ga. 1925), also cited by defendants, are entrapment cases and therefore irrelevant, since defendants do not argue entrapment. Finally, defendants also cite *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 920 (1959),

for the proposition that no agreement exists if a necessary party feigns acquiescence, but their argument is defeated by a footnote in the article itself:

> The fact that one person's agreement is feigned should not prevent a conspiracy conviction when there are at least two others involved whose mutual adherence to the common plan is genuine.

Id. at 926, 927 n.35.

Also without merit is defendants' related argument that the government failed to satisfy the overt act requirement because each act involved some communication with government agents and therefore did not actually further the conspiracy. The words "any act to effect the object of the conspiracy" in § 371 require only that the act be intended to have the described effect, not that it actually succeed. *Collier* v. *United States,* 255 F. 328, 329 (5th Cir. 1918); *United States* v. *Root,* 366 F.2d 377, 383 (9th Cir. 1966); *see also Hall* v. *United States,* 109 F.2d 976, 984 (10th Cir. 1940); *cf. Jung Quey* v. *United States,* 222 F. 766, 771-772 (9th Cir. 1915).

B.

Defendants' second argument is that there could be no conspiracy to violate § 2314 because in the absence of any stolen goods an essential element of the substantive crime, viz., that the defendants know the goods to be stolen, could not exist. Essentially, the argument is that a conspiracy to violate § 2314 cannot exist unless and until someone has stolen the goods the conspirators plan to transport in interstate commerce.

Plausible as this argument may seem at first, it ignores the nature of the crime of conspiracy, which is an agreement to commit a substantive crime, accompanied by an overt act in furtherance of the agreement. Whether the

substantive crime itself is, or is likely to be, committed is irrelevant. Thus, although § 2314 cannot be violated unless there are in fact stolen goods, a conspiracy to violate that section occurs when two or more persons agree to attempt to commit acts which include all the elements of a crime under that section and any overt act is done pursuant to the agreement. Here Rose and Peterson intended to cause the goods to be stolen and then transported in interstate commerce with knowledge that they had been stolen. All that was necessary, in addition to an overt act, was that the intended future conduct they had agreed upon include all the elements of the substantive crime.

United States v. *Thompson,* 493 F.2d 305 (9th Cir.), *cert. denied,* 419 U.S. 834 (1974), is in accord. There the court held proof that the substance involved was marijuana to be unnecessary for conviction of the crime of conspiracy to smuggle marijuana [3] stating,

> . . . the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent such may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. . . . Thus, whether or not the substance involved was marijuana is irrelevant.

493 F.2d at 310 (citations omitted). Also, in *Carlson* v. *United States,* 187 F.2d 366, 369-370 (10th Cir. 1951), the court rejected a contention analogous to that of defendants here and in so doing rejected in dictum the very contention made here. Holding that a conspiracy to violate 18 U.S.C.

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[3] The conspiracy conviction was for violation of former 21 U.S.C. § 176a, which contained both substantive and conspiracy provisions. The substantive provision contained a knowledge requirement similar to the one in 18 U.S.C. § 2314. Section 176a was repealed in 1970. Act of Oct. 27, 1970, Pub. L. No. 91-513, tit. III, pt. B, § 1101 (a)(2), 84 Stat. 1291.

§ 415, the predecessor to § 2314, was established even though the wheat stolen and transported in interstate commerce was not shown to be of a value of $5,000 or more, as former § 415 required, the court stated,

> To establish the conspiracy charge in count one, it was necessary to prove by competent evidence that appellants, by concerted actions, agreements and understandings, undertook to fraudulently obtain wheat in Oklahoma of a value of $5,000.00 or more and transport the same in interstate commerce, and that an overt act in furtherance of the conspiracy was committed by one the conspirators. It was not necessary, however, to prove that wheat of a value of $5,000.00, or more, or that any wheat in fact was fraudulently obtained and transported. The offense was complete when the unlawful agreement was formulated and an overt act in furtherance thereof was performed.

187 F.2d at 369-370. *Cf. also Jung Quey* v. *United States, supra,* 222 F. at 771-772.

C.

What we have said also disposes of the defendants' contention that the government's evidence was deficient in failing to prove the existence of stolen goods "of the value of $5000, or more," as required by § 2314. On this issue, *Carlson, supra,* is direct authority. Although reversing convictions of the substantive crime because the government had failed to prove that the wheat involved had a value of $5000 or more, the court upheld the conviction for conspiracy to violate § 2314 because the government did prove that defendants

> by . . . agreements . . . undertook to fraudulently obtain wheat in Oklahoma of a value of $5000.00 or more and transport the same in interstate commerce . . . . It was not necessary, however, that wheat of a value of $5000.00, or more, . . . in fact was fraudulently obtained and transported.

187 F.2d at 369. In the case at bar, the only necessary evidence relating to value was that the defendants agreed to transport, in interstate commerce, stolen goods worth $5,000 or more.[4]

II.

Defendants also argue that the trial court should have excluded the testimony concerning Srbinovich's first telephone conversation with Rose because the government failed to produce the tape recording of the conversation. In the alternative, it is argued that the court should have given a defense-proposed instruction dealing with the failure to produce the recording.

Defendants' initial contention, that the tape recording constitutes the "best evidence" of that telephone conversation, is wholly without merit. The so-called "best evidence rule," codified and expanded to cover recordings and photographs in Fed. R. Evid. 1001 through 1004, requires only that a party seeking to prove the contents of a document introduce the original document or explain why it cannot be produced. In the case at bar, the government sought to prove the contents of a conversation, not the contents of a tape recording. Consequently, the "best evidence rule" is inapplicable. *United States* v. *White,* 223

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[4] Even though it was unnecessary to prove the value of the target goods, there was sufficient evidence to establish a value (which under 18 U.S.C. § 2311 is market value) of $5,000 or more. The owner herself placed a value, established by an appraisal, of $25,000 on a ring that was among the target goods. Peterson valued portions of the jewelry at $100,000. Rose valued the goods at $200,000 and offered to pay Skaggs $10,000 for his share before the goods were to be sold. "Thieves' market value" was enough, standing alone. *United States* v. *Drebin,* 557 F.2d 1316, 1328-1329 (9th Cir. 1977). Thus *United States* v. *Nall,* 437 F.2d 1177 (5th Cir. 1971), relied upon by defendants for the proposition that evidence of the value of goods to their owner is insufficient proof of their market value, is inapposite.

F.2d 674, 675 (2d Cir. 1955); *United States* v. *Gonzales-Benitez,* 537 F.2d 1051 (9th Cir.), *cert. denied,* 429 U.S. 923 (1976); *see* 5 *Weinstein's Evidence* ¶ 1002[03] at 1002-11 (1976), Notes of Advisory Committee on Proposed Rules accompanying Fed. R. Evid. 1002, 28 U.S.C.A. Fed. R. Evid. at 768, and McCormick, *Handbook of the Law of Evidence* § 233 at 563-564 (2d ed. 1972).

Defendants also argue that, because of the government's failure to produce the tape recording at trial, the court should have excluded any testimony concerning the conversation or, alternatively, should at least have given any instruction which defendants proposed.

Whether sanctions should be imposed "depend[s] on the extent of the Government's culpability for the loss or destruction and the amount of the prejudice to the defense which resulted." *United States* v. *Miranda,* 526 F.2d 1319, 1325-1326 (2d Cir. 1975) (applying this test to evidence producible under *Brady* v. *Maryland,* 373 U.S. 83 (1963)). Here the trial court found, on the basis of sufficient evidence, that the government had met its burden of satisfactorily explaining the circumstances of the loss by showing that it was the result of negligence, *see Miranda, supra,* 526 F.2d at 1326, which leaves open only the question of prejudice.

Inasmuch as the loss of the tape was caused by mere negligence, the question becomes "whether the defense was so greatly prejudiced by the unavailability of the recording at the trial as to require the imposition of sanctions against the government." *Miranda, supra,* at 1328. In the case at bar, it is highly unlikely that the defense was prejudiced by the loss of the tape. The essentials of the testimony about the conversation were fully confirmed and corroborated by later events, which independently proved the conspiracy. If the loss of the tape, which was fully aired before the jury, *cf. Miranda, supra,* at 1328, prejudiced either side, it was probably the government. The judge did not err in declining to impose sanctions on the government.

Nor did the court err in refusing to give the instruction tendered by defendants which is printed in the margin.[5] The proposed instruction was argumentative and would have erroneously exaggerated the importance of the loss of the tape in relation to the government's case as a whole.

The convictions are affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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[5] The proposed instruction was as follows:

Where a party had evidence in its possession which that party claims would tend to establish the proof of its case, the failure to produce that evidence on demand raises a presumption that if produced, the evidence would not have the claimed effect.

This presumption does not arise if the party failing to produce presents evidence which satisfies you that its failure to produce was innocently brought about by misadventure, and without any intent of the non-producing party to conceal the evidence. If you are satisfied that such evidence was unavailable for such innocent reason, then you shall not make any presumption against the party, and you may, moreover, consider secondary evidence in the form of testimony as to the content of the missing evidence.

If, on the other hand, you are not satisfied from the evidence offered to justify the failure to produce that such failure was innocent, then the presumption takes effect. In applying the presumption, you should regard the failure to produce as affirmative evidence of the weakness of the case of the defaulting party, and you shall construe all inferences against the party in default.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 23, 1979.

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Francis C. Whelan, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 78-1331 vs.

WILLIAM ROSE and ROBERT PETERSON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 76-CR-929

Alfred Y. Kirkland, *Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellants, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Francis C. Whelan, Senior District Judge for the United States District Court for the Central District of California, is sitting by designation.